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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TOM CONWAY,

Plaintiff and Appellant,

v.

JOE CAFFERY et al.,

Defendants and Respondents.

E055656

(Super.Ct.No. CIVMS1100211)

OPINION

APPEAL from the Superior Court of San Bernardino County. Frank Gafkowski, Jr., Judge. (Retired judge of the former L.A. Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Tom Conway, in pro. per., for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

On July 28, 2011, plaintiff Tom Conway filed his first amended complaint, alleging six causes of action based on his dealings with defendants in a series of real estate loan transactions.

On August 11, 2011, defendants filed a demurrer to the first amended complaint. On August 31, 2011, the trial court sustained the demurrer without leave to amend. After Conway's motion for reconsideration was denied, Conway filed this appeal from the ensuing judgment.

I

STANDARD OF REVIEW

A demurrer is usually used to test the sufficiency of the factual allegations of the complaint to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)¹ In this case, defendants alleged a special demurrer for lack of capacity to sue under section 430.10, subdivision (b). But, in any case, our standard of review is a de novo standard of review.

In reviewing a general demurrer, the facts pled are assumed to be true and the only issue is whether they are legally sufficient to state a cause of action. "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to

¹ Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Our standard of review is de novo: “Treating as true all material facts properly pleaded, we determine de novo whether the factual allegations of the complaint are adequate to state a cause of action under any legal theory, regardless of the title under which the factual basis for relief is stated. [Citation.]” (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 486.)

II

PROCEDURAL BACKGROUND

A. *The First Amended Complaint*

The first amended complaint alleges that Conway is the “lawful owner” of seven itemized real properties in San Bernardino and Riverside Counties. He specifically alleges that he held “an interest in the Properties as the 100% beneficial owner of a trust or a Limited Liability Company and signed personally for the Defendants loans.”

Defendant Joe Caffery is alleged to be “a licensed mortgage broker who has arranged loans for CONWAY with private investors for over 10 years” Caffery and Conway had a business relationship for 11 years and completed about 100 transactions over that period of time. After the real estate crash in 2008, they agreed that they would

continue to work together. Conway then describes a number of transactions involving Caffery which were funded by various private lenders.

As described below, the sufficiency of the specific allegations of the various causes of action are not challenged. Six causes of action are alleged: (1) fraud; (2) negligent misrepresentation; (3) breach of fiduciary duty; (4) breach of contract; (5) breach of implied covenant of good faith and fair dealing; and (6) violation of Business and Professions Code section 17200.

B. *Defendant's Demurrer*

On August 11, 2011, defendants² filed a demurrer to the first amended complaint. The demurrer is based on section 430.10, subdivision (b), which provides that a defendant may file a demurrer on grounds that “[t]he person who filed the pleading does not have the legal capacity to sue.” Defendants also cite section 367, which provides that “[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.”

Defendants then attack the allegation in the first amended complaint that Conway is the lawful owner of each of the seven subject properties. They do so by presenting

² Defendants are Joe Caffery and his firm, Caffery Financial, and individual lenders: Darren D. Elkins, Linda Elkins, Patricia J. Lamb individually, Patricia J. Lamb, Trustee of the Patricia J. Lamb living trust, Pensco Trust Company custodian for the benefit of Patricia J. Lamb Roth IRA and The Amy Moran Roth IRA. Also named as a defendant is Golden State Foreclosure Services.

evidence, consisting of recorded deeds and deeds of trust, attached as exhibits to the demurrer.

The first property is referred to as Sunny Sands in the City of Joshua Tree. A 2009 grant deed shows title in a trust. Conway was trustee of the trust. Defendants also submitted a trustee's deed upon sale which shows that, after foreclosure in 2011, the property was transferred to defendant Darren D. Elkins.

The second property is 2945 Mesquite Springs Road in Twentynine Palms. The demurrer relies on a 2007 grant deed which conveys the property to "Tom Conway, Trustee of the Mesquite Springs #2 Trust." Conway was therefore a trustee for the trust which owned the property at that time.

The third property is 2960 Mesquite Springs Road in Twentynine Palms. Exhibit D to the demurrer is a 2007 deed of the property to "The Mesquite Springs Trust, California Recovery Inc., Trustee."

The fourth property is 74993 Serrano in Twentynine Palms. Exhibit E to the demurrer is a 2008 deed to "Tom The Home Buyer, LLC, a California Limited Liability Company."³

The fifth property is 57528 Onaga Trail in Yucca Valley. Exhibit F to the demurrer is a 2009 deed to "Tom The Home Buyer, LLC, a California Limited Liability Company."

³ "Tom The Home Buyer" is a limited liability company owned by Conway.

The sixth property is 241 Santa Rita in Banning. Exhibit G to the demurrer is a grant deed showing a transfer to Home Team Eight LLC.

The seventh property is 4909 Encelia in Twentynine Palms. The demurrer alleges that, according to the county recorder's office, the property does not exist.⁴

Based on the foregoing, defendants argue that Conway is not the owner of the properties and therefore has no standing to sue.⁵

C. *Conway's Response*

In his response to the demurrer, Conway acknowledges that he is not the current owner of the properties: "This is the whole thrust of the case in that he was induced out of them by deceit." But he contends he was the 100 percent beneficial owner of a trust or limited liability company that owned each property.

D. *The Trial Court's Decision*

The trial court issued an eight-page tentative decision that was adopted after the demurrer hearing. After reviewing the facts stated above, the court states: "Plaintiff concedes that he no longer owns the subject property. He does, however, contend that he was the owner and has the right to proceed against the Defendants as to the manner in

⁴ The problem here seems to be that the complaint refers to 4909 Encelia, assessor's parcel No. 612-211-64, while the demurrer refers to 4907 Encelia, assessor's parcel No. 612-211-59. In defendants' response to Conway's opposition to the demurrer, defendants allege that the owner of 4909 Encelia is Paradyne Homes, Inc.

⁵ Of course, it cannot be determined who was the owner of each property at the time the action was filed without a title search for each property. As discussed below, Conway alleges that he was the 100 percent beneficial owner at some time in the past, and that he was fraudulently induced to transfer the properties.

which they obtained the subject property from him. [¶] The problem for Plaintiff, however, is that none of the documents reviewed specifically identify Plaintiff by name as the owner. Plaintiff has submitted to the Court no judicially noticeable documentation to support his action.” The court concludes by finding that Conway “has failed to set forth sufficient facts upon which to support his standing to pursue this action. Furthermore, Plaintiff has failed to allege any damages (how he can be damaged) which is fatal to his pleading.” (Boldface omitted.) The court then sustains the demurrer without leave to amend. The court did not state any reasons for denying leave to amend.

E. *Motion for Reconsideration*

On September 13, 2011, Conway filed a motion for reconsideration. He presented a proposed second amended complaint which alleges that he “held a[n] interest of each of the properties itemized below by virtue of his beneficial interest in the title holding entity.” A number of documentary exhibits were attached to the proposed second amended complaint.⁶

As a new fact, Conway attached an assignment from “Tom The Homebuyer LLC & Tom Conway, Trustee” to “Tom Conway, Individually” of “all causes of action resulting or arising from the ownership of the properties listed below” He then

⁶ On June 18, 2012, Conway requested us to take judicial notice of additional documents. By order filed July 9, 2012, ruling was reserved on the request. Finding the documents unnecessary for our decision, we deny the request.

signed for each property as trustee or managing member of the LLC, and he signed for himself as assignee.

The trial court denied the motion for reconsideration, stating “you do need to have an attorney represent you in these matters if you’re a titled person and so forth.”

III

DISCUSSION

Section 430.10 allows a special demurrer on grounds that the person who filed the pleading does not have the legal capacity to sue.

The term “capacity to sue” refers to the legal ability of plaintiff to come into court. For example, minors lack capacity to sue. “[1] There is a difference between the *capacity* to sue, which is the right to come into court, and the *standing* to sue, which is the right to relief in court. [Citations.] Thus, although a plaintiff may have ‘capacity’ to sue, if the complaint shows that he is not a real party in interest and therefore lacks ‘standing’ to sue, a ‘general’ demurrer will be sustained. [Citations.] [¶] [(2)] One of the grounds of demurrer was that the complaint failed to state a cause of action because plaintiff did not allege it owned or possessed the real property allegedly damaged by the acts of defendants. Accordingly, if the complaint was insufficient upon this ground the judgment must be affirmed even though the trial court, in sustaining the demurrer, erroneously referred to plaintiff’s ‘capacity’ to sue. [Citations.] [¶] An element of a cause of action for injury to real property is the plaintiff’s ownership, lawful possession, or right to possession, of the property. [Citation.] The complaint failed to allege that

plaintiff owned the real property comprising the condominium, nor was there any allegation of plaintiff's possession, or right to possession, of such property. It was alleged merely that, under the declaration of covenants, conditions and restrictions, plaintiff was required to repair such common areas of the condominium as were injured by defendants' wrongful acts. Hence, the complaint stated no cause of action in plaintiff." (*Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co.* (1973) 31 Cal.App.3d 220, 224-225, fn. omitted.) In the present case, however, there are no allegations of damage to real property.

“A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on the merits. [Citation.]’ [Citation.] Because elements for standing ‘are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. [Citations.]’ [Citation.] . . . [¶] ‘Because standing goes to the existence of a cause of action, lack of standing may be raised by demurrer or at any time in the proceeding’ [Citation.]” (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1345.)

The question here is whether Conway is a real party in interest within the meaning of section 367. A real party in interest is “one who has “an actual and substantial interest in the subject matter of the action and who would be benefited or injured by the judgment in the action.” [Citation.]’ [Citation.] With regard to an action for transfer of

real property, only the person claiming title to the property has the actual and substantial interest to be a real party in interest. A cause of action seeking the transfer of an interest in real property cannot be assigned absent assigning the interest in the property.

[Citation.]” (*Chao Fu, Inc. v. Chen* (2012) 206 Cal.App.4th 48, 57) In our case, Conway is not seeking a transfer of title to real property.

““A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law.” [Citation.] The purpose of this section is to protect a defendant from harassment by other claimants on the same demand. [Citation.]’ [Citation.]” (*Doe v. Lincoln Unified School Dist.* (2010) 188 Cal.App.4th 758, 765.)

Thus, standing is usually defined in terms of whether plaintiff is a real party in interest with respect to the claim involved in the litigation. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 2:80, p. 2-28.1.)

We agree with the trial court that Conway cannot assert causes of action for damage to the real property in which he allegedly held a beneficial interest, but not an ownership interest. (*Estate of Bowles* (2008) 169 Cal.App.4th 684, 691.) Nor can he, as a nonattorney, represent others. (*Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 547-548.) But he *can* appear in propria persona to assert claims on his own behalf. As to those claims, he is a real party in interest.

Accordingly, the question is whether the causes of action asserted in the first amended complaint are actions for damage to the real estate or claims arising from dealings between Conway and defendants.

Even a superficial review of the first amended complaint reveals that the alleged causes of action arise from Conway's dealings with defendants.

In the first cause of action, for example, Conway alleges that Caffery, Elkins, and Lamb made false representations that led Conway to take certain actions, to his detriment. Similarly, the second cause of action, for negligent misrepresentation, alleges that Caffery, Elkins, and Lamb made representations to Conway to induce him to "carry upside down properties and make improvements to them with no reasonable expectation of profit" to Conway. The third alleged cause of action, for breach of fiduciary duty, alleges that Caffery and Caffery Financial owed Conway a fiduciary duty, and they breached that duty. The fourth cause of action, for breach of contract, alleges that certain defendants breached the terms of certain loan agreements. The fifth cause of action alleges that defendants breached the implied covenant of good faith and fair dealing. The sixth cause of action alleges that defendants violated the unfair competition law, Business and Professions Code section 17200 et seq. Damages sought are well over a million dollars.⁷

⁷ We therefore do not understand the basis for the trial court's ruling that Conway has failed to allege any damages, and that the failure "is fatal to his pleading." (Boldface omitted.) Even if there was such a failure, it could be easily cured by allowing the pleading to be amended.

In short, none of these causes of action depend on the ownership of any property because Conway is not relying on any such ownership to assert his claims. Nor is he asserting claims on behalf of past property owners, including himself, or on behalf of his own limited liability company. *Conway is only alleging that he personally had business dealings with defendants and they defrauded him.*

We therefore conclude that Conway is a real party in interest and has standing to sue on the alleged causes of action. “The real party in interest has “an actual and substantial interest in the subject matter of the action,” and stands to be “benefited or injured” by a judgment in the action.’ [Citation.] ‘Plaintiffs have standing to sue if they or someone they represent have either suffered or are threatened with an injury of sufficient magnitude to reasonably assure the relevant facts and issues will be adequately presented.’ [Citation.]” (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 54-55.) Such injury is alleged here.

Even if there was a persuasive argument that Conway lacked standing to sue under section 430.10, subdivision (b), the defect would probably be only a technical defect, and the trial court should have granted leave to amend. (*Helfrich v. Kerley* (1961) 192 Cal.App.2d 726, 729.) “The trial court exercises its discretion in declining to grant leave to amend. [Citation.] If it is reasonably possible the pleading can be cured by amendment, the trial court abuses its discretion by not granting leave to amend. [Citation.] The plaintiff has the burden of proving the possibility of cure by amendment. [Citation.]” (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 78.) In this

case, we find it reasonably possible that any defect in the pleading could be cured by amendment.

IV

DISPOSITION

The judgment is reversed and the case is remanded for further proceedings in accordance with the views expressed in this opinion. Conway shall recover his costs on appeal.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.